No.

In The Supreme Court of The United States

OCTOBER TERM, 1960

JORGE GABRIEL ROCHA,
JOSE DaPAIXAO ANDRADE,
MANUEL CORREIA DaLUZ,
JOSE DaSILVA DaLUZ,
FRANCISCO DaSILVA RODRIGUES,
MANUEL DasNEVES VIRISSIMO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Your petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on March 2, 1961.

OPINIONS BELOW

The opinion of the District Court for the Southern District of California is reported in 182 F. Supp. 479, and is shown in Appendix A, pp. 11-44.

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported; it is shown in Appendix B, pp. 45-64.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1961, and is shown in Appendix D, p. 67. On March 28, 1961, the Supreme Court of the United States granted an order extending time to file petition for writ of certiorari to May 1, 1961. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Does the District Court of the United States have jurisdiction to indict and try an alien found within the Court's jurisdiction for crimes against the laws of the United States which were committed abroad?

2. Did Congress intend under 18 U.S.C. 1546, to give extraterritorial effect to the laws of the United States and jurisdiction to the Courts of the United States as against aliens who violate such laws outside the United States?

3. If Congress did intend to grant power to the Courts to give extraterritorial effect to 18 U.S.C. 1546 with respect to its enforcement against non-citizens of the United States, was such grant of power a constitutional extension of congressional powers?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved is Article I, Section 8, clause 10 of the United States Constitution; the statutes involved are 8 U.S.C. 1325, 18 U.S.C. 1546 and 18 U.S.C. 3238; the pertinent portions of each are set forth in Appendix C.

STATEMENT OF THE MATTER INVOLVED

The Judgment of the Court of Appeals sought to be reviewed is a judgment convicting the petitioners of knowingly making a false oath before a consular officer abroad. 18 U.S.C. 1546.

The indictment contained four Counts; the first Count charged petitioners and others with conspiracy to defraud the United States to permit the petitioners who are immigrants to make unlawful entries into the United States as immigrants in a claimed preferred status, viz. as husbands (through alleged sham marriages) to United

States citizen brides. 8 U.S.C. 1325. Additionally each petitioner was charged in three substantive Counts of: (a) knowingly making a false oath before a consular officer abroad ("Count II series"); (b) obtaining and accepting an immigrant visa by means of a false statement with respect to a material fact in a visa application; (c) accepting and retaining an alien registration permit card so fraudulently obtained. 18 U.S.C. 1546.

Each defendant was convicted of the conspiracy Count I, and the Count charging the making of the false statement (the so-called "Count II" series). Each defendant was acquitted of the remaining two Counts. The judgment of conviction as to Count I (conspiracy) was reversed by the Ninth Circuit Court of Appeals, and was affirmed as to Count II.

The remaining "Count II" series charges the defendant petitioners with knowingly making under oath before a consular officer of the United States a false statement with respect to material facts in an application for immigrant visas in violation of 18 U.S.C. 1546. The government contended that each of the defendant petitioners herein represented himself to be the husband of an American citizen and claimed by reason of such marital status to be entitled to a non-quota immigrant visa, whereas in truth and in fact the said marriage was a sham, false and fraudulent marriage entered into for the sole purpose of enabling each such defendant to claim the non-quota immigrant status to which he would otherwise not be entitled. It was conceded by the Government and assumed by the District Court and the Court of Appeals that all alleged criminal acts done by the petitioners were done outside of the United States.

The jurisdiction of the District Court was asserted because the petitioners, prior to the indictment and trial, had entered and remained in the United States. 18 U.S.C. 3238.

REASONS AND ARGUMENT FOR GRANTING THE WRIT

For the reasons outlined below, each of the questions presented herein embody important questions of federal law which have not been, but should be settled by this Court; each of the questions presented herein embody federal questions decided by the Court of Appeals in a way which is in conflict with the applicable decisions of this Court.

This approaches a case of first impression in this Court and presents the following questions:

1. Did Congress intend, when it enacted Title 18 U.S.C. 1546, to extend jurisdiction to the Federal Courts to crimes against the laws of the United States when an alien commits the crime in a foreign country?

2. If Congress did so intend, did Congress have the necessary constitutional power to extend jurisdiction extraterritorially?

Regarding the intention of Congress, legislation is prima facie territorial. As stated in American Banana Company v. United Fruit Company, 213 U.S. 347, 357 (1909):

"The foregoing considerations would lead

> in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."

The Court of Appeals attempts to avoid the effect of this doctrine by stating that Congress must have intended to extend the law of the United States to aliens in that most of the offenses described in Section 1546 could be committed only by an alien when he is in a foreign country. However, this argument does not take into consideration the fact that many of the acts described in Section 1546 also could be committed by a United States citizen while outside of the United States, either directly or as the agent of an alien (i.e. filing and preparation of an affidavit of support). It would seem that had Congress intended to extend jurisdiction for crimes committed beyond the United States to aliens, that a much clearer expression of intention would have been made to overcome the fact that legislation is prima facie territorial.

Assuming that Congress did so intend to extend jurisdiction, did Congress have the constitutional power to do so? The Government relies on Article I, Section 8, Clause 10 of the United States Constitution as constitutional authority wherein it is stated:

> "Congress shall have power . . . to define and punish piracies and felonies committed on the high seas and offenses against the Law of Nations." (Emphasis added)

However, the "Law of Nations" is the law between nations and not something between individual persons and Nations. M. D. Vattel, Law of Nations (1829, p. 47).

The case of The Apollon, 22 U.S. 362, 370 (1824), stands for the basic principle that:

> "The laws of no nation can justly extend beyond its own territories, except so far as it regards its own citizens."
> (Emphasis added.)

The question as to whether jurisdiction would extend as against aliens for crimes committed outside the United States was raised in the case of United States v. Bowman, 260 U.S. 94, 102 (1922), wherein this Court did not decide the question.

Nevertheless, the District Court and Court of Appeals accepted the Government's contention that jurisdiction attaches in this case under the "protective principle", which is based on the premise that a sovereign state must be able to protect itself from those who attack its sovereignty. A careful reading of all cases cited in the opinions below will reveal language which seems to support the "protective principle" as being a part of the law of the United States. However, examination of the factual backgrounds of the cited cases indicates that the expression of the "protective principle" is mere dicta in that there were other basic grounds for jurisdiction to attach, such as the fact that the defendant was a citizen, or that some of the acts of the crime were done either by the defendant alien (or by the defendant alien's agent) within the United States.

One District Court case cited, United States v. Archer, 51 F. Supp. 708 (S.D. Cal., 1943), seems to uphold the "protective theory". However, the decision is weakened in that it is based on the erroneous conclusion that jurisdiction attached because the crime was committed within a consular office of the United States, and as an additional supporting basis for jurisdiction, that a portion of the crime (entry) had been committed within the United States.

The position of petitioners is bolstered by the decision in United States v. Baker, 136 F. Supp. 546 (S.D. N.Y., 1955), which holds that there can be no jurisdiction when the alien is charged with a crime committed abroad. The Baker case, at page 548, distinguishes the instant fact situation from United States ex rel. Majka v. Palmer, 67 F. 2d 146 (7th Cir. 1933), in that the Palmer case involved the deportation of an alien. The court observed that deporting an alien is far different from indicting and trying an alien for a crime committed abroad.

There are compelling reasons why the Courts have been reluctant to broaden the jurisdiction of the Courts to extend to aliens for crimes committed against the United States in foreign countries. As pointed out in the Baker case, supra, at page 549, the United States strenuously objects when foreign countries have presumed to assert jurisdiction over United States citizens for crimes committed in the United States. In fact, most treaties of extradition provide that the contracting parties need not surrender their own nationals for crimes committed abroad. 2 Hyde, International Law 1027 (2d Ed. 1945).

If the United States should so extend its jurisdiction, it is very possible that other countries would adopt a similar policy. This could result in a United States citizen being subjected to arrest upon arrival in a foreign country under a charge that the sovereignty of the arresting country had been injured by acts of the United States citizen committed in the United States. Because of varying interpretations as to what might constitute an attack on the sovereignty of a nation, it would leave United States citizens abroad under peril of being arrested on unwarranted and unnecessary charges and thereby further impede the free travel of persons here and abroad.

The United States should not assert jurisdiction in this type of case except when there is the most grave and extreme attack on the sovereignty of the United States. In this case, the Government could, and in fact did, in its first indictment, charge the defendant aliens with illegal entry based on a false document. In that way, the Government could have fully protected itself from any harm which might inure. In fact, there was no actual harm to the United States, in the sense meant by the "protective principle", until there was the actual entry. Jurisdiction does not attach in this type of situation. The advantages to be gained, if any, by the United States are greatly outweighed by the disadvantages to the citizens of the United States when they travel abroad, and the other practical problems which will arise from such a decision.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari be issued out of this Honorable Court directed to the Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named, ~~a full~~ complete transcript of the proceedings of that Court herein, being the case numbered and titled in its docket as Rocha, et al, Appellants, v. United States of America, Appellee, No. 16,839, dated March 2, 1961, and that the judgment of that Court be reviewed by this Court, and for such other relief as to this Court may seem proper.

DATED: This 26th day of April, 1961.

WILLARD WHITTINGHILL

JOHN S. RHOADES

APPENDICES

APPENDIX A

UNITED STATES of America,

Plaintiff,

v.

Francisco Da Silva RODRIGUEZ, et al.,

Defendants.

No. 28854.

United States District Court

S. D. California, S. D.

March 29, 1960

Laughlin E. Waters, U. S. Atty., Los Angeles, Cal., George W. Kell, Asst. U. S. Atty., San Diego, Cal., for plaintiff.

Verne O. Warner, William Bruner, San Diego, Cal., for defendants.

JAMES M. CARTER, District Judge.

[1] The present case raises this question: May aliens, found within the United States, be prosecuted here for the commission of crimes allegedly committed

outside the territorial limits of the United States, when the crimes charged concern the use of false statements to secure the documents necessary for admission into the United States?

The issue is raised on the motion of six defendants (Rodriguez, Virrissimo, Rocha, Andrade, Manuel Da Luz and Jose Da Luz), all of whom are aliens, to dismiss certain counts of the indictment for lack of jurisdiction of the court to hear the action.

Count 1 of the indictment, which is not here in issue, sets forth the alleged factual situation surrounding this case. This count charges that the "immigrant" or "alien" defendants, who have made this motion, conspired with seven "citizen" defendants and six "brides" to secure unlawful admission to the United States, in violation of § 1325 U.S.C.A., Title 8. The "brides" are termed "un-indicted co-conspirators" in the indictment, but have plead guilty to a prior indictment. It is alleged that a "bride" would enter into a sham marriage with one of the "aliens" in order to enable the alien, a native of Portugal, to apply for and obtain a non-quota immigrant visa to which he would not otherwise be entitled.

Of the counts challenged, counts 2, 5, 8, 11, 14 and 17 are generally identical except that each names a separate defendant. In addition, one defendant is charged with commission of offenses at the American Embassy, Panama, Republic of Panama; and another is charged with the commission of offenses at the American Embassy, San Jose, Costa Rica. The remainder of the defendants are charged with the offenses at Consular offices on foreign soil. Counts 3, 6, 9, 15 and 18 are likewise generally identical with the same exceptions.

Counts 2 and 3 are set forth in the margin as examples.[1]

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1. "Count Two
"(U.S.C. Title 18, Sec. 1546 -
False Statement in Immigration Application)

"On or about April 18, 1957, at the American Consulate; Tijuana, Baja California, Mexico, defendant Francisco Da Silva Rodrigues knowingly made under oath, before a consular officer of the United States of America, a false statement with respect to a material fact in an 'Application for Immigrant Visa and Alien Registration', an application, affidavit and document required by the immigration laws and regulations prescribed thereunder, in violation of Title 18, Section 1546, U.S.C., in that said defendant, a native of Portugal (a quota area, as defined and provided by section 1151 of Title 8 U.S.C., and the proclamations issued by the president thereunder), stated and represented that he was the husband and spouse of one Kathleen Walker, an American citizen, and beneficiary of her 'Petition by United States Citizen for Issuance of Immigrant Visa', granted by the Department of Justice on December 14, 1956 and numbered VP-16-I-10014, and in that said defendant further stated, represented and claimed to be a non-quota immigrant under section 101(a) (27) (A) of the Immigration and Nationality Act by reason of his said marital status and of the said 'Petition by United States Citizen for Issuance of Immigrant Visa'; whereas in truth and in fact, as said defendant then and there well knew, his marriage to the said American citizen was a sham, false and fraudulent marriage entered into by said persons without any intention of consummating said marriage or of living together as husband and wife, but was in fact entered into for the sole purpose and intent of enabling the said defendant to secure a non-quota immigrant visa at a time when said defendant was a quota immigrant

Footnote 1 continued.

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by reason of his said nativity and as such was not entitled to claim or receive a non-quota visa.

"The said 'Petition by United States Citizen for Issuance of Immigrant Visa,' a necessary part of defendant's false statement aforesaid, was executed by the said Kathleen Walker as agent for defendant on or about November 26, 1956 in the County of San Diego, State of California, with in the Southern Division of the Southern District of California, and its said execution was procured and induced by defendant at or about the time of its said execution.

"Said defendant may now be found, and is residing within, the County of San Diego, State of California, within the Southern Division of the Southern District of California.

"Count Three
"(U.S.C. Title 18, Sec. 1546 -
Obtaining Immigrant Visa
Based on False Claim)

"On or about April 18, 1957 at the American Consulate, Tijuana, Baja California, Mexico defendant Francisco Da Silva Rodrigues obtained, received and accepted an immigrant visa, required for his entry into the United States, knowing the same to have been procured by means of false claims and statements and by fraud, which said claims and statements were, namely, that said defendant was the husband of a citizen of the United States; that he was beneficiary of a 'Petition by United States Citizen for Issuance of Immigrant visa' numbered VP-16-I-10014; that based thereon said defendant was entitle to claim, and claimed, to be a non-quota immigrant; and the same was false and fraudulent, as defendant then and there well knew, in that the

The counts are based on Title 18, U.S.C.A. § 1546.[2]

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the said marriage to the said United States citizen was a false and fraudulent relationship which had been entered into by and between the defendant and his alleged wife, one Kathleen Walker for the sole purpose of enabling said defendant to claim the said non-immigrant status at a time when the defendant, a native of Portugal, was a quota immigrant, and as such was not entitled to enter, be or remain in the United States under the said non-quota immigrant status in violation of Title 18, Section 1546, U.S.C.

"Said defendant may now be found, and is residing within, the County of San Diego, State of California, within the Southern Division of the Southern District of California."

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2. "§ 1546. Fraud and misuse of visas, permits, and other entry documents.

"Whoever, knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or * * *

"Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement -

The count 2 series charges the making of a false statement in an immigration application, based on the last charging paragraph of § 1546; the count 3 series charges the obtaining of an immigration visa by a false claim, based on the first paragraph of § 1546.

It is apparent, then, that all counts challenged by the defendants have in common the allegations that the defendant, an alien, committed an offense against the laws of the United States while outside the territorial jurisdiction of this court and while physically present in an American Embassy or Consular office of the United States on foreign soil. The "false statement" counts differ from the "obtaining visa based on false claim" counts in that the false statement counts allege that previous to the execution of the false statement by the immigrant defendant, he had procured, through the agency of his bride, the filing of a "Petition by United States Citizen for Issuance of Immigrant Visa" in the United States, and that this petition formed a necessary part of the immigrant defendant's false statement.

Contentions

Essentially it is the contention of the defendants that the offense charged in the indictment is outside the jurisdiction of this court; indeed, that it is outside the jurisdiction of any court of the United States. The basis

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"Shall be fined not more than $2,000 or imprisoned not more than five years, or both. As amended June 27, 1952, c. 477, Title IV, § 402(a), 66 Stat. 275."

for this assertion is the concept that the criminal jurisdiction of any government is limited to acts committed within the territorial bounds of that nation. The government, on the other hand, denies that the territorial theory is presently applicable, concluding that the court should apply a so-called "protective theory" of jurisdiction. It is asserted that in certain cases in which the laws of the United States are violated, and the crime constitutes an offense directed at the government in its capacity as sovereign, the government has the power to punish those who have broken its laws, should those persons later be found in the United States.

Although these positions seem to be diametrically opposed, they are not. They are both, however, accurate statements of a segment of the law applicable to this sort of situation; and when the overall picture is developed, both will have validity within its own context. Before either of these contentions are considered, it will be necessary to determine the scope and application of the sections of Title 18, under which the defendants are charged.

Scope of § 1546, Title 18 U.S.C.A.

The pertinent parts of § 1546, Title 18 U.S.C.A. must be construed to determine if Congress has attempted to define a crime, or crimes, involving acts committed beyond the territorial jurisdiction of the United States. If this has not been done, our inquiry is at an end and the motion to dismiss must be granted. Section 1546, Title 18 U.S.C.A., is the last section of Chapter 75, entitled "Passports and Visas." All the prior sections in Chapter 75 deal with the various crimes committed in connection with the possession and use of

passports. Most of these sections contain prohibitions against acts which could, in all probability, be commited only outside the United States. Section 1541 in part prohibits a consular officer from knowingly and wilfully verifying a passport for a person not owing allegiance to the United States. Section 1542 in part prohibits the wilful and knowing use or attempted use of a passport secured by any false statement. Section 1543 in part prohibits use or attempted use of a false, forged, counterfeited, mutilated or altered passport. Section 1544 in part prohibits the use or attempted use of a passport issued to another, or the use or attempted use of a passport in violation of the conditions and restriotions contained therein.

In § 1546 Congress has sought to embody all similar abuses which would relate to the use of visas or other documents pertaining to entry into the United States.[3]

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3. Section 1546, Title 18 U.S.C.A., was amended in 1952 to include, after the words "visa or permit" contained in the first paragraph, the words " * * * or other document required for entry into the United States," June 27, 1952, c. 477, Title IV, Sec. 402(a), 66 Stat. 275. The last paragraph was also amended to include the knowing presentation of a document contalning a wilfully false statement. These technical changes in the wording of the section serve to broaden the number of documents covered by the law, and in no way dimínish or alter the basic application of the section.

/2/ The difference between a passport and a visa was certainly known to the framers of these sections. A passport is given by a government to one of its citizens as evidence of that government's permission for the holder to travel. United States ex rel. Calamia v. Redfern, C.C.D. La. 1910, 180 F. 506, 508. The document is addressed to the governments of those lands through which the holder may pass, and requests that these foreign governments grant the holder permission to travel through their lands, giving him all lawful protection while in the foreign state. It also directs that the foreign diplomatic and consular offices of the issuing country provide their good auspices while the bearer is abroad. Communist Party of the United States v. Subversive Activities Control Board, 1954, 96 U.S. App. D.C. 66, 223 F.2d 531, 555.

A visa, on the other hand, is a recognition of the validity of a passport and an affirmative response to the implied requests mentioned above, issued by the government of the country in which the holder of the passport desires to travel. See, United States ex rel. Johanson v. Phelps, D.C.D.Vt. 1926, 14 F.2d 679, 681.

Turning again to the phraseology used in § 1546 itself, it appears that the crimes indicated by the following words in the first paragraph - "* * * forges, counterfeits, alters * * * falsely makes * * *" - are all acts which could be committed either within or without the territorial limits of the United States. The same is true of the words "utters" or "possesses", both of which are included in that same paragraph.

However, in light of the purpose of a visa as discussed above, the words "uses" and "attempts to use"

plainly refer to acts which would be committed prior to or upon entry into the United States. The same is equally true of the phrase "* * * obtains, accepts or receives * * * *." While it is conceivable that a situation would arise in which these acts could be committed within the United States, it seems clear that the statute was not directed solely at the act of passing a visa from one person to another after the document had been used to secure entry into the United States.

The last paragraph of §1546 provides that "whoever" knowingly makes any false statement under oath in "any application, affidavit, or other document required by the immigration laws * *", or who knowingly presents such a document shall be guilty of an offense. The making of a statement to be used in a visa application will normally take place outside the territorial limits of the United States; and the presentment of a document containing a false statement will almost invariably take place outside the United States as the alien presents his papers for approval by a government consular or embassy officer.

/3/ We have considered such cases as American Banana Co. v. United Fruit Co., 1908, 213 U.S. 347, 357, 29 S. Ct. 511, 53 L. Ed. 826, holding that all legislation is prima facie territorial, and have concluded that any such inference has been overcome by a reading of this statute.[4] We conclude that the intent of § 1546 is to provide criminal punishment for those who, through

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4. See United States v. Bowman, 1922, 260 U.S. 94, 98-100, 43 S. Ct. 39, 67 L. Ed. 149, for an excellent discussion of the interpretation of the jurisdictional bounds of a criminal statute, differentiating American Banana Co., supra.

fraud or other means committed within or without the boundaries of the United States, manage to provide themselves with, or use or attempt to use, unauthorized documents requisite to entrance into the United States.

/4/ Additional support for this view is found in Part III, Chapter 12 of Title 8. Chapter 12 itself is entitled "Immigration and Nationality" while Part III, which is composed of three sections, 1201-1203, is entitled "Issuance of Entry Documents." Of these three sections, the first two set forth, in general terms, the steps to be taken by a consular officer during the procedure leading up to the issuance of a visa. The last section (1203) deals with reentry permits. A "consular official" customarily is a person residing in a foreign city. On him is placed the duty of supporting commercial intercourse and protecting the citizens of his government. Schunior v. Russell, 1892, 83 Tex. 83, at page 88, 18 S.W. 484, at page 485; also see Rocca v. Thompson, 1911, 223 U.S. 317, 32 S Ct. 207, 56 L.Ed. 453. Hence, the words "consular officer" as used in these two sections, indicate that the issuance of a visa, and the transactions leading up to that act, are contemplated as taking place in a foreign land.

Section 1202, for example, provides that an alien shall make application for an immigrant visa and for alien registration. In subdivision (e) of the same section, the following appears:

> "* * * each copy of an application required by this section shall be signed by the applicant in the presence of the consular officer, and verified by the oath of the applicant administered by the consular officer * * *".

The very fact that the law requires that the alien take an oath to his application, made before a consular officer, is a further reason for holding that Congress intended to encompass acts of an alien, who, outside the United States, "* * * uses, attempts to use * * * obtains, accepts, or receives * * *" any visa or permit, knowing it to have been procured by means of any false claim or statement (first paragraph, § 1546); and for the alien who "* * * knowingly makes under oath any false statement with respect to a material fact in any application * * * required by the immigration laws * * *" (last charging paragraph, § 1546).

The significance of the oath requirement becomes clear on consideration of Title 22 U.S.C.A., which deals in general terms with the powers, duties and organization of the foreign service. Section 1203 of that Title makes general provision for dealing with those who make falst statements to a consular officer under oath. After providing that certain of the consular staff be empowered to take such statements as are required by their duties while in a foreign country, the statute further provides as follows:

> "* * * Every such oath, affirmation, affidavit, deposition, and notarial act administered, sworn, affirmed, taken, had, or done, by or before any such officer * * * shall be as valid, and of like force and effect within the United States, to all intents and purposes, as if administered, sworn, affirmed, taken, had, or done, by or before any other person within the United States duly authorized and competent thereto. If any person shall willfully and

> corruptly commit perjury, or by any means procure any person to commit perjury in any such oath, affirmation, affidavit, or deposition, within the intent and meaning of any Act of Congress now or hereafter made, such offender may be charged, proceeded against, tried, convicted, and dealt with in any district of the United States, in the same manner, in all respects, as if such offenses had been committed in the United States * * * and shall be subject to the same punishment and disability therefore as are or shall be prescribed by any such act for such offense * * *".

There can be no doubt that the effect of this statute is to provide for extra territorial jurisdiction, and to provide it in all statutes requiring an oath.

The validity of § 1203, Title 22, U.S.C.A., has been considered in several cases, but the courts have given scant attention to its constitutionality. A short discussion of the cases involving this statute is given, infra, after our discussion of the basic considerations here involved.

The Constitutional Basis for Extra-territorial Jurisdiction

[5, 6] Various provisions of the United States Constitution have been advanced in support of the validity of § 1546, Title 18 U.S.C.A., when that section is construed to have an extraterritorial effect.[5] We have

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5. The count 2 series in the indictment has a paragraph not found in the count 3 series, that might appear to avoid the constitutional issue. As an example, count 2 alleges that the offense of making a false statement before a consular officer occurred at Tijuana, Mexico, on April 18, 1957. It is then alleged that a "Petition by United States Citizen for Issuance of Immigration Visa," i.e. the petition of the "bride" made to secure the immigrant visa, was a "necessary part of defendant's false statement" made on April 18, 1957, and that this petition by the "bride" was made in San Diego, California on November 26, 1956. It is further alleged that its "execution was procured and induced by the defendant" on such date.

For two reasons we believe the constitutional issue as to the count 2 series of the indictment remains in the case. First, this act of the bride was committed at an earlier date, and thus the situation does not come within the cases where the act of the defendant, after its commission, had an effect or impact in the United States. Strassheim v. Daily, 1910, 221 U.S. 280, 31 S.Ct. 558, 55 L.Ed. 735; United States v. Steinberg, 2 Cir., 1932, 62 F.2d 77; Hartzell v. United States, 8 Cir., 1934, 72 F.2d 569. Second, a defendant must be charged with reasonable certainty. Count 2 of the indictment, so construed, charges an offense in Mexico on April 18, 1957, and not the commission of an offense in the United States through the acts of an agent on November 26, 1956. To construe this count of the indictment as charging an offense on November 26, 1956, and another on April 18, 1957, would make the count duplicitous.

We treat the offense in count 2, therefore, as having been committed in Mexico on April 18, 1957, and conclude that the constitutional issue on the count 2 series is before the court in this case.

rejected reliance on any of the constitutional provisions with the exception of Art. I, Sec. 8, Clause 10, which provides:

> "The Congress shall have Power * * * To define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations." /emphasis supplied/;

and Art. III, Sec. 2, Clause 3, reading:

> "The Trial of all Crimes * * * shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." /Emphasis supplied./

The other constitutional provisions advanced which we do not think pertinent are included in the footnote.[6]

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6. Article III, Sec. 2, Clause 1.
"Sec. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; To Controversies * * * between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."
Article I, Sec. 8, Clause 4.
"The Congress shall have Power * * To establish an uniform Rule of Naturalization * * *"

Before consideration is given to the power of Congress to define and punish offenses against the law of nations, we propose to discuss the nature of criminal jurisdiction under international law. A Harvard research project, Research in International Law, considered various problems of international criminal jurisdiction, reporting its conclusions in 1935 (see Research on International law, Part II, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. Supp. 435 (1935)). The reporter for that portion of the project, Professor E. D. Dickinson, summarized their findings concerning five general principles of international jurisdiction:

> "These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth,

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Article I, Sec. 8, Clause 18.
"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of United States, or in any Department or Officer thereof."

> the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character * * *; The third is claimed by most states, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence." Id. at 445.

We are concerned with the application of the first and third principles mentioned, the territorial and protective theories.

/7/ The territorial principle has often found expression in our case law.[7] One of the first broad statements of this theory was made in The Apollon, 1824, 9 Wheat. 362, 6 L. Ed. 111, where the court set forth

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7. Church v. Hubbart, 1804, 2 Cranch 187, 234, 2 L. Ed. 249; The Apollon, 1824, 9 Wheat. 362, 370, 6 L. Ed. 111; Slater v. Mexican National R. Co., 1903, 194 U.S. 120, 126, 24 S.Ct. 581, 48 L. Ed. 900; American Banana Co. v. United Fruit Co., 1908, 213 U.S. 347, 355, 29 S.Ct. 511, 53 L. Ed. 826; United States v. Freeman, 1915, 239 U.S. 117, 120, 36 S.Ct. 32, 60 L. Ed. 172; United States v. Bowman, 1922, 260 U.S. 94, 98, 43 S Ct. 39, 67 L. Ed. 149; Yenkichi Ito v United States, 9 Cir., 1933, 64 F.2d 73, 75, certiorari denied 289 U.S. 762, 53 S.Ct. 796, 77 L. Ed. 1505; United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, 318, 57 S.Ct. 216, 81 L. Ed. 255.

the doctrine in these sweeping terms: "The laws of no nation can justly extend beyond its own territories, except so far as it regards its own citizens." Id. 9 Wheat. at page 370. This "general rule" is followed by a limitation, necessary to a proper interpretation of the territorial concept: "/The laws of a nation/ can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction." Ibid. The basic philosophy behind the territorial theory is that a government, in order to maintain its essential sovereignty, must be the only power capable of effecting the maintenance of peace and order within its own boundaries. Therefore, no other nation can enact extraterritorial legislation which would interfere with the operation of such laws.

Despite the prevalence of the territorial concept of jurisdiction in our jurisprudence, studies of international law such as the Harvard project mentioned, supra, indicate that as a statement of the entire international law of jurisdiction, it is inadequate. As a statement of one general precept of the international law of jurisdiction, it becomes entirely adequate.

/8/ Unfortunately, this territorial theory has sometimes been considered to be an exclusive expression of the international law of jurisdiction. The simplicity of any such generalized theory is deceiving, since it fails to take into account the ever present factual complexities which are evidenced by a constantly growing body of exceptions to the rule. Nationals abroad are held to be subject to the laws of their government wherever they may be, Blackmer v. United States, 1931, 284 U.S. 421, 436, 437, 52 S.Ct. 252, 76 L.Ed. 375, and cases and authorities cited therein. But this is an

application of the nationality theory, not an exception to territorial jurisdiction.

/9/ Acts committed outside the territorial limits of the State but intended to produce, or producing, effects within the boundaries of the State are subject to penal sanctions; Strassheim v. Daily, 1910, 221 U.S. 280, 285,31 S.Ct. 558, 55 L.Ed. 735; Ford v. United States, 1926, 273 U.S. 593, 620, 621, 47 S.Ct. 531, 71 L.Ed. 793; United States v. Aluminum Co. of America, 2 Cir. ,1945, 148 F.2d 416, 443; Ramirez & Feraud Chili Co. v. Las Palmas Food Co., D.C.S.D. Cal. 1956, 146 F.Supp. 594, 600, affirmed 9 Cir., 245 F.2d 874. Where the effect is felt by private persons within the State, penal sanctions rest on the "objective," or "subjective," territorial principle used in the Strassheim case, supra. See 29 Am.J.Int'l L.Supp., at 484 et seq. Where the effect of the acts committed outside the United States is felt by the government, the protective theory affords the basis by which the state is empowered to punish all those offenses which impinge upon its sovereignty, wherever these actions take place and by whomever they may be committed.[8] The results of such a theory, are, in

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8. The essence of the protective theory of jurisdiction was recognized as early as Church v. Hubbard, 1804, 2 Cranch 187, at pages 234-235, 2 L.Ed. 249, where the court stated:

"* * * The authority of a nation, within its own territory, is absolute and exclusive. * * * But its power to secure itself from injury may certainly be exercised beyond the limits of its territory * * *. Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain

many ways similar to those reached in the Strassheim case, supra, where the court directed its attention to the objective results of the criminal act and the location of its effect. Any act which would offend the sovereignty of a nation must, of necessity, have some effect within the territorial limits of that state or there would be no adverse effect upon the government justifying a penal sanction.

/10/ The protective principle was codified by the Harvard group in Article 7 of their report:

> "A state has jurisdiction with respect to any crime committed outside its territory by an alien against the security, territorial integrity or political independence of that state, provided that the act or omission which constitutes the crime was not committed in exercise of a liberty guaranteed the alien by the law of the place where it was committed." 29 Am. J. Int'l L. Supp., at 543.[9]

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the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to."

9. James Brown Scott set out the codification of this same area made by the Institute of International Law, meeting in 1931 (James Brown Scott, "The Two Institutes of International Law," 26 Am. J. Int'l L. 87 at 89 (1932)):

"Art. 4. Every State has the right to punish acts committed outside its territory, even if committed by foreigners, when such acts constitute:

"(a) an attempt against the security of the State;

* * * * *

This rule is applicable even when the deeds in question are not provided for by the penal laws of the

It is clear that international law recognizes not only the territorial theory of jurisdiction, but also the protective principle and several others as well. Having these principles in mind, it is now necessary for us to consider their effect upon the potential exercise of jurisdiction by our constitutionally created government.

A state might seek to exercise its jurisdiction in two general localities: First, it can attempt to impose its laws upon those found within its boundaries, holding these persons, whoever they may be, liable for acts committed within or without the territorial limits of the State. Second, the state might seek to control the actions of those physically in some other sovereign nation. This distinction was clearly expressed in a case tried by the International Court. The S. S. Lotus, P.C.I.J., Ser. A, No. 10,. II Hudson, World Court Reports 20:

> "* * * the first and foremost restriction imposed by international law upon a state is that - failing the existence of a permissive rule to the contrary - it may not exercise its power in any form in the territory of another state. In this sense jurisdiction is certainly territorial; it cannot be exercised by a state outside its territory except

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This rule is applicable even when the deeds in question are not provided for by the penal laws of the country in whose territory they have been committed."

In commenting upon the prevailing theory used to support jurisdiction in the Anglo-Saxon countries and comparing it to that employed by the Continental European countries, Mr. Scott concluded that neither is sufficient in and of itself, each borrowing from the other to meet the needs of the nation. This codification sought to bring the two together, adopting portions of each to secure a more comprehensive protection of the state and its citizens.

by virtue of a permissive rule derived from international custom or from a convention.

"It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respects any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law * * *. Far from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, /international law/ leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable. * * *

"In these circumstances, all that can be required of a state is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty * * *.

"Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the state which

adopts them, and they do so in ways which vary from state to state. The territoriality of criminal law, therefore, is not an absolute principal of international law and by no means coincides with territorial sovereignty." /Emphasis supplied./[10]

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10. On the surface, the two theories herein discussed seem to conflict: the use of the protective theory to assert jurisdiction over an act committed outside the territorial limits of a state, but within the boundaries of another nation, might be an interference with the sovereignty of the nation in which the act is committed, a result barred by the territorial theory. However, the protective concept attempts to reach only those acts which are directed at the integrity of the other state and not those acts directed at the peace and quiet of the nation in which they are committed. The territorial theory applies to those acts which have an effect upon the internal peace of the nation in which they are committed.

This distinction was made in United States v. Bowman, 1922, 260 U.S. 94, 43 S.Ct. 39, 67 L.Ed. 149, when the court upheld the application of the United States criminal laws to the actions of American nationals abroad. The same reasoning provided a basis for the decision in a case involving the right of Japan to try an American service man stationed there for acts committed outside the scope of his duties. Wilson v. Girard, 1954, 354 U.S. 524, at page 529, 77 S.Ct. 1409, at page 1411, 1 L.Ed. 2d 1544.

The last portion of Art. 7 of the Harvard project's codification recognizes this apparent conflict and resolves it by limiting the protective jurisdiction of a nation to those acts which are not guaranteed as liberties by the country in which they are committed.

We do not decide the problems that might arise should the defendant already have been tried and punished for the same act by the country in which he committed the illegal act.

/11, 12/ There is no question as to the power of Congress to enact § 1546, Title 18 U.S.C.A., insofar as it applies only to acts committed within the United States. We have stated that the power of Congress to enact this section with its extraterritorial effect is found in Art. I, Sec. 8, Clause 10: "To define and punish * * * Offences against the Law of Nations." The powers of the government and the Congress in regard to sovereignty are broader than the powers possessed in relation to internal matters, United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255.

> "* * * The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect to our internal affairs." Id., 299 U.S. at page 315, 57 S.Ct. at page 219.
>
> "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." Id., 299 U.S. at page 318, 57 S.Ct. at page 220.

The court cites other Supreme Court cases on the power to acquire territory by discovery and occupation, to expel undesirable aliens, and to make such international agreements as do not constitute treaties, concluding that none of these powers are

> "* * * expressly affirmed by the Constitution, /but/ nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." Ibid.

/13/ Entry by an alien into the United States secured by means of false statements or documents is an attack directly on the sovereignty of the United States. The effect of such an entry in connection with espionage or subversive activities clearly pinpoints the great impact such an entry could have on sovereignty.

To put it in more general terms, the concept of essential sovereignty of a free nation clearly requires the existence and recognition of an inherent power in the state to protect itself from destruction. This power exists in the United States government absent express provision in the Constitution, and arises from the very nature of the government which was created by the Constitution.

/14/ Even the prohibitions in the First Amendment must yield to this inherent power. In American Communications Association, C.I.O. v. Douds, 1949, 339 U.S. 382, at page 394, 70 S.Ct. 674, at page 682, 94 L.Ed. 925, Chief Justice Vinson said:

> "Although the First Amendment provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established

> that those freedoms themselves are dependent upon the power of constitutional government to survive. If it is to survive it must have power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit unlawful acts. Freedom of speech thus does not comprehend the right to speak on any subject at any time." /Emphasis supplied./

In Carlson v. Landon, 9 Cir., 1951, 187 F.2d 991, at page 997, affirmed 342 U.S. 524, 72 S.Ct. 525, 96 L. Ed. 547, Stephens, Circuit Judge said:

> "The basic principles of our government that the individual shall be free to speak, free to publish, free to worship, free to be personally unrestrained, are not absolute. It would be an anomalistic use of the term 'government' to apply it to a state organization which is without the power to resist its own violent destruction." /Emphasis supplied./

/15, 16/ Possessing this power of protection, Congress is entitled to utilize it to the full extent. From the body of international law, the Congress may pick and choose whatever recognized principle of international jurisdiction is necessary to accomplish the purpose sought by the legislation. The mere fact that, in the past, Congress may not have seen fit to embody in legislation the full scope of its authorized powers is not a basis for now finding that those power are lacking. Disuse, or even misuse of power inherent in the federal government, or given to it by the Constitution, is not a

valid basis for us to hold that this power may not later be employed in a proper fashion.[11] Thus, having found that the protective principle exists as a recognized doctrine of international law, or the "Law of Nations," it becomes a principle that Congress can rightfully incorporate into its legislation without waiting for action to be taken by foreign governments which would grant the United States the right to exercise jurisdiction. Without the right to act in the same fashion, and to the same extent, as other sovereigns, the United States government becomes something less than whole (United States v. Curtiss-Wright Export Corp., supra, 299 U.S. at page 318, 57 S.Ct. at page 220).

The Prior Case Law

Turning now to a consideration of the prior cases which have involved statutes seeking to give the government extra-territorial jurisdiction over aliens for acts committed outside the United States, we find a scarcity

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11. Note the further comment of the Reporter to the Harvard Research Project concerning the existence of the protective principle in international law:

"* * * In view of the fact that an overwhelming majority of States have enacted such legislation, it is hardly possible to conclude that such legislation is necessarily in excess of competence as recognized by contemporary international law. The contention advanced by certain Anglo-American writers that jurisdiction over aliens is restricted to those within the territory and to pirates appears to be the result of a tendency to equate the exercise of jurisdiction undertaken in a particular State with competence as determined by international law." 29 Am.J. Int'l L. Supp. at 556.

of material involving the constitutionality of such legislation.[12]

Judge Yankwich gave exhaustive consideration to the predecessor of § 1203, Title 22 U.S.C.A. (set out in part, supra). He held that the statute was constitutional (United States v. Archer, D.C.S.D. Cal. 1943, 51 F.Supp. 708) when applied to an alien who had made a false statement to a vice-consul at Guadalajara, Mexico, while applying for a non-immigrant visa. The decision was based on alternate theories. First, it was concluded that the consulate was United States territory

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12. The conspiracy cases involving unlawful entry of an alien into the United States are of no assistance to us, since they do not consider the extraterritorial effect or constitutionality of the statute. This is undoubtedly because part, if not all, of the acts involved occurred in the United States. See, [illegible]wak v. United States, 1952, 344 U.S. 304, 73 S.Ct. 481, 97 L.Ed. 593 (conspiracy based on 8 U.S.C.A. (1946 Ed.) § 180a, now 8 U.S.C.A. § 1325, and 8 U.S.C.A. (1946 Ed.) § 220(c), now 18 U.S.C.A. § 1546); United States v. Rubenstein, 2 Cir., 1945, 151 F.2d 915, certiorari denied 326 U.S. 766, 66 S.Ct. 168, 90 L.Ed. 462 (conspiracy based on 8 U.S.C.A. (1946 Ed.) § 180a, now 8 U.S.C.A. § 1325). For the same reason we do not place reliance upon those cases involving use of the United States mails to defraud. See United States v. Steinberg, 2 Cir., 1932, 62 F.2d 77; Hartzell v. United States, 8 Cir., 1934, 72 F.2d 569.

and under control of our government.[13] Second, and more germane to our inquiry, Judge Yankwich found that the statement was an offense "* * * not against the country where the consul is, but against the sovereignty of the United States". Id., at page 711.[14] He then went on to say: "/The alien's/ Act being a fraud against the United States, deception practiced in order to secure a benefit - the Congress had the right to punish it as perjury." Ibid.

In a case decided some ten years prior to the Archer decision, supra, the Seventh Circuit held that a statement made under oath to an American consul abroad was a crime, under the predecessor of § 1203, sufficient to support deportation proceedings (United States ex rel. Majka v. Palmer, 7 Cir., 1933, 67 F.2d 146). The court refused to consider the possibility of

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13. It is doubtful that the United States would assert jurisdiction over the territory of a consulate in a foreign country. The accepted rule that the consulate and its staff is protected by immunity under International law and treaties, should be differentiated from the claim that all matters occurring within the consulate's bounds are subject to the laws of the United States. See II-Hackworth, Digest of International Law, 623 (1941).

14. See also 2 Moore's International Law Digest 266 where the author reaches the same conclusion:

"As these acts /the oath by the alien/ are performed under the laws of the United States, not only does the person who appears before a secretary of legation or a consular officer for any of the purposes enumerated in the act submit himself to the laws of the United States to that extent, but if he swears falsely - he violates a law to whose execution in its territory the foreign government has consented."

whether or not the United States might have had the power to seek the extradition of the defendant from some foreign country for this offense, and went on to say (Id., at page 147):

> "* * * it seems clear to us that when he did enter the United States, thereby making use of the fraudulent passport for the very purpose for which the crime was committed, he placed himself within the control of its laws and subjected himself to whatever proceedings it might see fit to bring as the result of his criminal act. It therefore becomes immaterial to determine whether or not perjury is held to be a crime in Poland, since the crime admitted was committed against the United States.)" /Emphasis supplied./

In reaching its conclusion that the deportation proceedings should be affirmed, it was necessary for the court to conclude that there had been a crime committed against the United States. The lack of prosecution and conviction for the crime was overcome by the fact that the alien admitted that he had committed the acts charged. Having concluded that the acts admitted constituted a crime, it follows that had the government brought criminal prosecution instead of deportation proceedings, and had the facts admitted been proven, the alien could have been punished for this violation of the law.

In United States v. Flores-Rodriguez, 2 Cir. 1956, 237 F. 2d 405, the defendant alien had been convicted of a violation of § 1203, involving a false statement made to an American vice-consul in Havana, Cuba, concerning

the defendant's lack of a criminal record. After concluding that the vice-consul had authority under the law to administer the oath, the court affirmed the conviction without comment on the jurisdictional question.

In Chin Bick Wah v. United States, 9 Cir., 1957, 245 F. 2d 274, certiorari denied 355 U.S. 870, 78 S. Ct. 120, 2 L. Ed. 2d 76, the Ninth Circuit affirmed the conviction of a Chinese alien for making a false statement under oath to the American vice-consul at Hong Kong. The alien was charged and convicted of conspiracy to violate the immigration laws as well as under a substantive count based on § 1546, Title 18 U.S.C.A., the latter count apparently identical in nature with that presently before us. Although the court carefully considered the factual basis of the conviction, it did not discuss, or even mention, any possible constitutional objections to the validity of this section.[15]

/17/ United States v. Baker, D.C.S.D. N.Y. 1955, 136 F. Supp. 546, considered the validity of a conviction of an alien for violation of 18 U.S.C.A. § 1001, falsification of a material fact within the jurisdiction of "* * * any department or agency of the United States * * *," in this case, the Immigration and Naturalization Service. The court specifically stated that the posture of the question before it required a decision as to whether

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15. An earlier Ninth Circuit case, Yenkichi Ito v. United States, 9 Cir., 1933, 64 F.2d 73, 75, contains language in support of the territorial theory of jurisdiction. It is not applicable here, however, since the court found that there was no legislative intent to extend the operation of the statute in question outside the territorial limits of the United States, and it did not have to decide the effect of such an extension.

or not the United States had the power to try an alien for a crime committed abroad. The court then answered this question in the negative. We cannot agree.

There are several reasons for our disagreement. First, the Baker case apparently did not consider the protective theory of jurisdiction, or at least did not find it applicable, nor did it mention the conclusions of Judge Yankwich in the prior Archer case, supra. Second, the court disposed of the Palmer case, supra, on the grounds that a deportation proceeding is far different from a trial (United States v. Baker, supra, 136 F. Supp. at page 548). While this may be true insofar as it applies to the deportation hearing itself, the necessary basis for the affirmation of the order of deportation involved a judicial determination that there had been a crime committed against the United States and her laws. Third, in considering the effect of the decision in the Strassheim case, supra, it was concluded that some further act would have to be done by the alien within the United States in order to have some effect within the United States. We do not think that such a limitation can be read into the Strassheim case. There, the Supreme Court held that the basis for jurisdiction was the production of some detrimental effect within the territorial limits of the state asserting jurisdiction. Id., 221 U.S. at page 285, 31 S.Ct. at page 560, 55 L.Ed. 735. When a crime coming within the scope of the protective theory of jurisdiction is involved, that detrimental effect takes place through the effect upon the sovereignty of the state. For these reasons we are unable to follow the decision

in the Baker case,[16] and think our holding is not contrary to Strassheim v. Daily, supra.

/18/ The alleged criminal acts having been committed in foreign countries, venue for trial is specified by § 3238, Title 18 U.S.C.A., as the district in which the offender is first found. Sec. 3238 is clearly authorized by Art. III, Sec. 2, cl. 3 of the Constitution, supra. The aliens entered this country at San Ysidro, California, a port of entry on the Mexican-American border within this district; were apprehended within the district and were indicted here.[17] Proper venue has been shown.

Conclusion

/19/ We accordingly hold that § 1546, Title 18 U.S.C.A., is constitutionally valid as applied to the crimes charged in the indictment, committed outside of the United States, where the defendant is subsequently apprehended within the United States. As a crime against the sovereignty of the state, the very existence of the state provides authority to Congress to prohibit its commission. In addition, the crimes charged fit in that category of crimes which the law of nations recognizes as offenses against sovereignty and within the express

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16. See, United States v. Menere, D.C.S.D. N.Y. 1956, 145 F.Supp. 88, distinguishing the Baker case from a prosecution under Title 18 U.S.C.A. § 2199, concerning the prosecution of stowaways; 45 Cal. L. Rev. 199 (1956).

17. For violations of Title 8, Chap. 12, Sub-Chapter II, § 1329 provides that prosecution of aliens for improper entry may be held wherever the violation occurs or wherever the alien may be apprehended.

power of Congress to fashion penal legislation concerning offenses "against the Law of Nations," Art. I, Sec. 8, Clause 10. Finally Congress was expressly authorized in Art. III, Sec. 2, Clause 3 to provide for the place of trial when the crime has not been "committed within any State."

The motions to dismiss the indictment are denied.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JORGE GABRIEL ROCHA, JOA DA PAIXAO ANDRADE, MANUEL CORREIA DA LUX, JOSE DA SILVA DALUZ, FRANCISCO DA SILVA RODRIGUES, MANUEL DASNEVES VIRRISSIMO,	)	No. 16,839
Appellants,	)	March 2, 1961
vs.	)	
UNITED STATES OF AMERICA,	)	
Appellee.	)	

Appeal From the United States District Court
for the Southern District of California
Southern Division

Before: ORR, BARNES and HAMLIN, Circuit Judges

BARNES, Circuit Judge:

The six appellants, herein known as "immigrant defendants," with eight indicted coconspirators (herein known as "coconspirators") and six unindicted coconspirators (herein known as "brides") were charged with conspiracy to defraud the United States. The object of the conspiracy was to permit the six immigrant defendants to make an unlawful entry into the United States, as immigrants in a claimed preferred status, viz. as husbands (through alleged sham marriages) to the United States citizen brides. 8 U.S.C. § 1325. Jurisdiction is claimed generally under 18 U.S.C. § 3231; and more specifically under 18 U.S.C. §§ 3237, 3238. We do not find 18 U.S.C. § 3237 applicable.

Additionally, each appellant was charged in three substantive counts of (a) knowingly making a false oath before a consular officer abroad (18 U.S.C. § 1546); (b) obtaining and accepting an immigrant visa by means of a false statement with respect to a material fact in a visa application; and (c) accepting and retaining an alien registration permit card so fraudulently obtained.

Each defendant was convicted on the conspiracy count (I), and one count charging the making of the false statement (the so-called Count II series). Each defendant was acquitted of the remaining two counts.

There are two principal questions raised on this appeal. The first relates to the conspiracy count, i.e., whether there were not six separate conspiracies, rather than a single conspiracy. Appellants admit arguendo that they and their "brides" and the eight indicted coconspirators entered into six different conspiracies, but all urge the conspirators did not enter into, nor was there any proof of, any one over-all conspiracy-merely "six separate, individual and unconnected conspiracies."

Reliance is placed on Kotteakos v. United States, 1946, 328 U.S. 750. Cf: United States v. Russano, 2 Cir., 1958, 257 F 2d 712; Poliafico v. United States, 6 Cir., 1956, 237 F.2d 97, cert. denied 352 U.S. 1025.

The second question raised is that the Count II series of convictions were based on the trial of an alien for a crime committed abroad, and hence these so-called "Count II" charges should have been dismissed for lack of jurisdiction in our district courts over a crime committed beyond the territorial limits of the court. Cf: United States v. Baker, S.D.N.Y., 1955, 136 F. Supp. 546. We consider the jurisdictional question first.

The penal §1546 under which the Count II series were prosecuted reads in material part as follows:

> "Whoever . . . uses, attempts to use, possesses, obtains, accepts or receives any immigration visa or permit, or other document required for entry to the United States, knowing it to be . . . falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . or
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> "Whoever knowingly makes under oath any false statement in any . . . document required by the immigration laws or regulations . . . /S/hall be fined . . . or . imprisoned . . . ."

We have eliminated all references to those portions of this section dealing with the forging, uttering,

counterfeiting or altering of the visa or permit, as none of such actions was proved against any defendant. Nor was the document falsely "made" by any direct act of any defendant.

The several appellants' responsibility, then, rests upon their use, possession, receipt or acceptance of an immigrant visa issued to them on the representation that they were married to various American citizens, and therefore were nonquota immigrants under § 101(a) (27) (A) of the Immigration and Naturalization Act "whereas in truth and in fact, as /each/ defendant well knew, his marriage to the said American citizen was a sham, false and fraudulent marriage."

This approaches a case of first impression. Cf. United States v. Lutwak, 7 Cir., 1952. 195 F.2d 748, affirmed, 344 U.S. 604; United States v. Rubenstein, 2 Cir., 1945, 151 F.2d 915, cert. denied, 326 U.S. 766; United States v. Birnbaum, S.D.N.Y., 1944, 55 F. Supp. 356. This circuit did not pass on the question of jurisdiction, nor was that question raised, in the only case that apparently has arisen in this circuit under § 1546. Chin Bick Wah v. United States, 1957, 245 F.2d 274, cert. denied 355 U.S. 870.[1]

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[1] We did there raise the problem of whether a party who has participated in a sham marriage (lacking an intent to really marry) makes a false statement when he says he is married. But not thinking it necessary to the decision, we laid that question to one side, and affirmed the conviction on the making of another allegedly false statement, made in China, that the wife "intended to join her husband" when she got to the United States.

In Lutwak v. United States, supra, the validity of the marriage was held immaterial, in view of the use to which the defendants intended to put it.[2] The conspiracy in Lutwak had the purpose of enabling defendants to make "illegal entries." That was the purpose of the conspiracy charged herein in Count 1. Such entries were listed as overt acts. Other overt acts

[2]Under the "War Brides Act" a male and two female veterans married in France and brought their respective spouses into this country. They never lived together or consummated their marriages, at least until prosecution was instituted. They were charged with conspiring to violate 18 U.S.C. § 1546, and convicted; the conviction was affirmed on appeal (195 F.2d 748), and the Supreme Court affirmed the conviction. The validity of the marriage was held immaterial. In speaking of congressional intent, Mr. Justice Minton said for the Court:

> "Congress did not intend to provide aliens with an easy means of circumventing the quota system by fake marriages in which neither of the parties ever intended to enter into the marital relationship . . . . When one of the aliens stated that he was married, and omitted to explain the true nature of his marital relationship, his statement did, and was intended to, carry with it implications of a state of facts which were not in fact true." 344 U.S. 604 at 611-12.

The opinion then cites with approval the language of the Rubenstein case, supra, that "for the purposes of that case, the parties were never married at all." While we may agree with the dissenting opinion that the government, a third party, in "simply ignoring the ceremony and its consequences," presents a close question of law (which we avoided in Chin Bick Wah, supra), nevertheless we are bound by the majority holding in Lutwak, supra, at least to the extent that proof of a sham marriage for the purpose of avoiding the immigration laws presents a question of fact that should, and must, go to the jury in a conspiracy case.

allegedly took place wholly or partially in the United States. Entries were accomplished in both cases; in both cases the appellants, upon unlawful entry, later were found within the jurisdiction of the federal courts. Thus, no jurisdictional problem arose in Lutwak, nor is there any jurisdictional problem with respect to Count I (conspiracy) in this case.

But the substantive counts (Count II series) of which appellants were convicted do not rest on the overt acts of Count I. The court below, in a careful and able analysis of what Congress intended (182 F. Supp. 479 at 484-6) comes to the conclusion that Congress intended to give to § 1546 extra territorial jurisdiction. We agree that such was the congressional intent.[3] We are then faced with the question of whether such a purpose can be lawfully accomplished, i.e., is constitutional.

Before we reach that question, however, we believe it proper to consider certain allegations which the trial judge below inferred might have been an attempt by the government to allege an act in each of the "Count II series" which would enable it and us to avoid the constitutional question. We agree with Judge Carter that despite such allegations (as to acts done within the United States by the "brides" as their "husbands'" agents), the offense charged in Count II as to the various bridegrooms was alleged to have been committed in Mexico (or elsewhere) on the date the papers

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[3] It is difficult to see how many of the offenses described in § 1546 could be committed by an alien were he not in a foreign country.

were signed at the respective American Consulates, and thus the constitutional issue as to the Count II series remains before us. See 182 F. Supp. 479, 486, n. 5.

This brings us to the point - can United States law have extra territorial jurisdiction? Or, more specifically as put to us by the appellants - does the district court have jurisdiction to indict and try an alien found within the court's jurisdiction for a crime committed abroad?

Appellants properly cite United States v. Baker, supra, as holding that the district court does not, and properly cite The Apollon, 1824, 22 U.S. 361, for the general rule, under the theory that territorial jurisdiction is essential, that "the laws of no nation can justly extend beyond its own territories, except so far as it regards its own citizens."

But, as appellants concede, Baker, supra, points out certain exceptions to the general rule.

> "While crimes against private individuals must still take place within the territory of the sovereign before the latter can properly assume jurisdiction, certain crimes directed toward the sovereign itself may be tried within the jurisdiction, even though committed without." Id. at 547-8.

But this jurisdiction is usually "predicated upon the citizenship of the offender rather than the locus of the crime." (United States v. Bowman, 1922, 260 U.S. 94, and cases cited in Baker, supra, at 548.)

The Baker opinion notes that "in only one instance has an alien been held accountable by the United States for a crime committed abroad." United States ex rel Majka v. Palmer, 7 Cir., 1933, 67 F.2d 146. There the alien was ordered deported for having made false statements under oath to an American Consul abroad when applying for a passport. But, the Baker court stated, "deporting an alien for perjury is far different from indicting and trying him for a crime committed abroad." Baker, supra, at 548.

We fail to see the purported distinction. Obviously the decision below herein rested not only on the act abroad, but also on the effect it produced within the boundaries of the United States, namely, the aliens' subsequent successful entrance at the border based on a document allegedly procured by fraud. This must have so occurred because the aliens were subsequently found and arrested within the United States, says the government. But suppose the act done abroad was the making of a false affidavit by "X" which enabled "Y" to enter the United States, and suppose further, "Y" never came into the United States, or entered on his own valid passport. Could "X" then be indicted? We see no reason why an alien coming within the territorial limits of a United States court should be placed in a more favorable position with respect to his actions taken against the sovereignty of the United States while he was abroad, than a United States citizen would be. We believe the principles enunciated by the Supreme Court in Strassheim v. Daily, 1911, 221 U.S. 280, 285, are here applicable. There Mr. Justice Holmes ruled:

> "Acts done outside a jurisdiction but intended to produce and producing detrimental effects

> within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." Id. at 285, citing cases, including American Banana Co. v. United Fruit Co., 1909, 213 U.S. 347, 356

And see: Ford v. United States, 1924, 273 U.S. 593, 620, 621; United States v. Aluminum Co. of America, 2 Cir., 1945, 148 F.2d 416, 433; Ramirez & Feraud Chili Co. v. Las Palmas Food Co., D.C.S.D. Cal., 1956, 146 F.Supp. 594, 600, affirmed, 9 Cir., 245 F. 2d 874, cert. denied, 355 U.S. 927.

The same rule logically should apply to national states, or nations. The acts done to violate § 1546 of Title 18 were all done outside the state, but they were intended (at least at the point of time when the fraudulent document was used to gain entry) to produce, and they did so produce, a detrimental effect on the sovereignty of the United States. Thus under "the protective principle," less well known than "the territorial principle," yet "claimed by most states," [4] there is, and should be,

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[4] "These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of person injured by the offence. Of these five principles, the first is everywhere regarded as of

jurisdiction. A sovereign state must be able to protect itself from those who attack its sovereignty. This was said more elegantly long ago by the Supreme Court, and noted in the opinion below in note 8. (Cf: Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-5 (1804).)

We agree with the court below that there are no constitutional provisions which prohibit the exercise of jurisdiction over an alien found within the sovereign's territory, under the protective principle theory. We do not think it necessary to search the Constitution to find specific authorization for such a jurisdiction.[5]

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primary importance and of fundamental character .... The third is claimed by most states, regarded with misgivings in a few, and generally ranked as the basis of an auxiliary competence."

United States v. Rodrigues, 182 F. Supp. 479 at 487, citing Research on International Law, Part II, Jurisdiction with Respect to Crime, 29 Am. J. Int'l L. Supp. 435 at 455 (1935).

[5]The court below relied on Art. I, Sec. 8, Clause 10, which provides:

"The Congress shall have Power * * *

* * * To define and punish Piracies and Felonies committed on the high Seas and Offences against the Law of Nations." (Emphasis added.)

It has been suggested in an interesting note in 13 Stanford Law Review 155 (December, 1960), entitled: Federal Jurisdiction Over Crimes Committed Abroad by Aliens, at pp. 157-58, that there exists a specific grant of power under the "necessary and proper clause" (Art. I, Sec. 8, Clause 18) to establish "an Uniform Rule of Naturalization." (Art. I, Sec. 8, Clause 4.) But see Garcia-Mora article, 19 U. Pitt. L. Rev. 567 (1958).

"The powers of the government and the Congress in regard to sovereignty are broader than the power possessed in relation to internal matters." United States v. Curtiss-Wright Export Corp., 1936, 299 U.S. 304, 315. And see: United States v. Archer, S.D. Cal., 1943, 51 F. Supp. 708, 711; United States ex rel Majka v. Palmer, supra.

Several courts, including this one, have believed and assumed that such jurisdiction exists, even though not specifically considering the constitutional question. Chin Rick Wah v. United States, supra; United States v. Flores-Rodriguez, 2 Cir., 1956, 237 F.2d 405.

When we consider the direct and indirect holdings of our courts that such jurisdiction exists, and compare it with the one case (Baker, supra) which holds to the contrary, we are, like the court below,[6] unimpressed by the Baker reasoning, and are, of course, not bound by it.

We affirm the district court's holding as to the substantive Count II series that it had jurisdiction over the alien found within its borders who had violated a statute passed to preserve the sovereignty of the United States.

This brings us to the consideration of what is appellants' first point, and one which they urge as their "main question" - was there one large conspiracy or six separate, individual and unconnected conspiracies?

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[6] See discussion, United States v. Rodriguez, 182 F. Supp. 479 at 492-94.

This was not a question raised on the motion to dismiss heard and determined by the court below prior to trial. (Cf: 182 F. Supp. 479.)

Here the "common key figure" of the conspiracy, so the government urges, was Kathleen Walker. We consider the facts.

June Ruth Jones, one of the "brides," was approached by one Mary Drummond, was introduced by Drummond to her "bridegroom," was paid in part by Drummond, and in part by Mary Rodrigues. Bride Jones was instructed by Drummond as to what to say to Immigration Officers, what to write to her husband, and who to go to (Reese, a notary public) to prepare the necessary petition upon which her "husband" was to enter the United States. Kathleen Walker first comes into this "transaction" by being present at the marriage (she was herself married at that time), and at the preparation of the petition, but it was Drummond, not Walker, who was the moving party.

Again, it was Mary Drummond who introduced Kathleen Walker to her intended husband's family, and who paid Kathleen Walker for going through with the marriage.

Kathleen Walker apparently was an enthusiastic convert. She interested Betty Jane Fleming in "marrying" one of the appellants, and took Fleming to Tijuana to meet her "intended husband," and to the notary's office, and was paid $25.00.

Kathleen Walker arranged the marriage of Deborah Good, took her to the notary, and to the Immigration

Office to file her petition.

Kathleen Walker introduced Sharon Metstrom to her "intended husband," but Sharon had first been contacted by Deborah Good. Walker also arranged the marriage of Karen Moody to her "husband."

Thus we can readily see why Kathleen Walker could be indicted and convicted of a conspiracy. But no one else (save perhaps June Ruth Jones or Drummond) apparently had any interest in any marriage other than their own; obviously each young lady was interested only in what was in it financially for her. One or two were present when some one of the others performed one or two of the alleged overt acts, but they were incidentally present, as mere spectators, and not as participants. The mother of two of the appellants, Matilda Da Silva Da Luz, was involved with two marriages, because her two sons were participants. She was not interested nor were the families of any "immigrant defendants" in the marriages of anyone not related to them. And in no event was any of the men here a defendant interested in any marriage but his own.

The Lutwak case, supra, is referred to by the government as being based "on very similar evidence," and by it the government seeks to justify this conspiracy indictment, and avoid the holding of the Kotteakos, supra, case. We therefore consider its facts at some length.

> "The petitioners, Marcel Max Lutwak, Munio Knoll, and Regina Treitler, together with Leopold Knoll and Grace Klemtner, were indicted on six counts in the Northern District of Illinois, Eastern Division. The first count

charged conspiracy to commit substantive offenses set forth in the remaining five counts and conspiracy to defraud the United States of and concerning its governmental function and right of administering the immigration laws and the Immigration and Naturalization Service, by obtaining the illegal entry into this country of three aliens as spouses of honorably discharged veterans. Grace Klemtner was dismissed from the indictment before the trial because her constitutional rights had been violated before the grand jury. At the conclusion of all the evidence, the District Court dismissed the substantive counts against all of the defendants because venue had not been shown in the Northern District of Illinois. The jury acquitted Leopold Knoll and convicted the three petitioners on the conspiracy count. The Court of Appeals affirmed, 195 F.2d 748, and we granted certiorari, 344 U.S. 809.

"We are concerned here only with the conviction of the petitioners of the alleged conspiracy. Petitioner Regina Treitler is the sister of Munio Knoll and Leopold Knoll, and the petitioner Lutwak is their nephew. Munio Knoll had been married in Poland in 1932 to one Maria Knoll. There is some evidence that Munio and Maria were divorced in 1942, but the existence and validity of this divorce are not determinable from the record. At the time of the inception of the conspiracy, in the summer of 1947, Munio, Maria and Leopold were refugees from Poland, living in Paris, France, while Regina Treitler and Lutwak lived in

Chicago, Illinois. Petitioner Treitler desired to get her brothers into the United States.

* * * *

"The first count of the indictment charged that the petitioners conspired to have three honorably discharged veterans journey to Paris and go through marriage ceremonies with Munio, Leopold and Maria. The brothers and Maria would then accompany their new spouses to the United States and secure entry into this country by representing themselves as alien spouses of World War II veterans. It was further a part of the plan that the marriages were to be in form only, solely for the purpose of enabling Munio, Leopold and Maria to enter the United States. The parties to the marriages were not to live together as husband and wife, and thereafter would take whatever legal steps were necessary to sever the legal ties. It was finally alleged that the petitioners conspired to conceal these acts in order to prevent disclosure of the conspiracy to the immigration authorities.

* * * *

"From the evidence favorable to the Government, the jury could reasonably have believed that the following acts and transactions took place, and that the petitioners conspired to bring them about. Lutwak, a World War II veteran, was selected to marry Maria Knoll, his aunt by marriage. He went to Paris where

he went through a marriage ceremony with Maria. They traveled to the United States, entering the port of New York on September 9, 1947. They represented to the immigration authorities that Maria was the wife of Lutwak, and upon that representation Maria was admitted. They never lived together as man and wife, and within a few months Munio and Maria commenced living together in this country as man and wife, holding themselves out as such. Lutwak, in the meantime, represented himself to friends as an unmarried man. Lutwak and Maria were divorced on March 31, 1950.

"Lutwak and Mrs. Treitler also found two women - Bessie Benjamin Osborne and Grace Klemtner - who were honorably discharged veterans of World War II, and who were willing to marry Munio and Leopold so that the brothers could come to the United States. Bessie Osborne was introduced to Treitler by Lutwak, and went to Paris accompanied by Treitler. There she went through a pretended marriage ceremony with Munio Knoll, and on their arrival at New York City, Munio was admitted on November 13, 1947, on the representation that he was married to Bessie Osborne. The marriage was never consummated and was never intended to be. The parties separated after entering the United States, and they never lived together as husband and wife at any time. Bessie Osborne's suit for divorce from Munio was pending at the time of the trial.

"Still later, Grace Klemtner, who was also

a World War II veteran and an acquaintance of Regina Treitler, went to Paris and went through a pretended marriage ceremony with Leopold. They then traveled to the United States, where Leopold was admitted on December 5, 1947, upon the representation that he was the husband of Grace Klemtner. They immediately separated after their entry into this country, and they never lived together as husband and wife at any time until about the time Grace Klemtner appeared before the grand jury which returned the indictment. This was approximately April 1, 1950, more than two years after the marriage ceremony in Paris. Bessie Osborne and Grace Klemtner received a substantial fee for participating in these marriage ceremonies.

"There is an abundance of evidence in this record of a conspiracy to contract spurious, phony marriages for the purpose of deceiving the immigration authorites and thereby perpetrating a fraud upon the United States. and of a conspiracy to commit other offenses against the United States." Lutwak v. United States, supra at 605-610.

Thus the Lutwak case might be authority to hold Kathleen Walker, and perhaps June Jones or Mary Drummond, as conspirators, or even to hold Mrs. Matilda Da Silva Da Luz as such a conspirator, but we see no basis for even an inference that any one "husband" was interested in anyone's marriage or entry other than his own. Nor do the remaining cases cited by the government aid them on this phase of the case.

In Shimi Miho v. United States, 9 Cir. 1932, 57 F.2d 491, Miho advised Ogo to represent he was the same person as another Japanese, who had previously entered the United States, first under the name of Yokota and later under the name of Ito. Ogo's claimed innocence of knowledge of the falsity of his statements, if believed, would have eliminated conviction of a conspiracy, but this court held there was a sufficient factual dispute to properly permit the jury to decide that issue.

In United States v. Rubenstein, supra, the appellant had fraudulently obtained a signature upon a blank petition for a visa for the alien Spitz from Sandler, the husband, for convenience of the alien Spitz. The defendant filed another false affidavit and a false letter of financial worth with the American Consul at Montreal, Canada; and Spitz entered from Canada. Thereafter the defendant Rubenstein arranged for a fraudulent divorce from Sandler of Spitz, and objected to evidence thereof being introduced, upon the theory the conspiracy had terminated when Spitz entered the United States fraudulently. No defendant attacked the sufficiency of the evidence to prove the conspiracy with respect to the one entry.

Thus while it is true both these cases "deal with a conspiracy," they do not aid the government to establish that the facts herein prove a single, rather than six separate conspiracies. We conclude the government here proved six conspiracies, not one.

> "We do not think that either Congress, when it enacted 269, or this Court, when deciding the Berger case /Berger v. United States, 295 U.S. 78, 79/ intended to authorize the

> Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all." Kotteakos v. United States, supra at 773.

The variance between proof of several separate conspiracies when one has been charged is prejudicial to the defendants. United States v. Russano, supra; Poliafico v. United States, supra.[7] And see Canella v. United States, 9 Cir., 1946, 157 F.2d 470, at page 476, wherein the court said:

> "The theory of the trial court here and of the trial court in the Kotteakos case, was that all the evidence relating to all the separate spokes in the wheel was admissible against McCormac and Wyckoff and was relevant to the charge of a single conspiracy because of the general rule that when one joins an existing conspiracy, he 'takes it over as it is' and becomes liable for all that has gone before or may happen later. However, 'to bring this rule into operation it is not enough that, when one joins with another in a criminal venture, he knows that his confederate is engaged in other criminal undertakings with other persons, even though they be of the same general nature. The acts and declarations of confederates, past or future, are never competent against a party except in so far as they are steps in

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7. And see: Brooks v. United States, 5 Cir., 1947, 164 F. 2d 142; Daily v. United States, 9 Cir., 1960, 282 F.2d 818 at 821-822.

furtherance of a purpose common to him and them. Declarations . . . become competent only when they are uttered in order to accomplish a common purpose.' See note 7.

"The view taken at the trial here, as in the trial of Kotteakos v. United States, (see note 7) 'confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.' "

The judgment of conviction as to Count I (conspiracy) is reversed as to each appellant. The judgment of conviction as to each appellant on the respective substantive counts is affirmed. The matter is remanded for appropriate action in accordance herewith.

(Endorsed) Opinion Filed March 2, 1961.

Frank H. Schmid, Clerk.

APPENDIX C

Constitution of the United States of America

Article I, Section 8, Clause 10

> "The Congress shall have Power. . . . To Define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;"

8 U.S.C. 1325 "Entry of Alien at Improper Time or Place; Misrepresentation and Concealment of Facts.

Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both . . . ." (June 27, 1952.)

18 U.S.C. 1546 "Fraud and Misuse of Visas, Permits, and Other Entry Documents.

Whoever, knowingly forges, counterfeits, alters or falsely makes any immigrant or nonimmigrant visa, permit, or other document required for entry into the United States, or utters, uses, attempts to use, possesses, obtains, accepts or receives any such visa,

permit, or document, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or ****

Whoever knowingly makes under oath any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document containing any such false statement - shall be fined not more than $2,000 or imprisoned not more than five years, or both." (As amended June 27, 1952.)

18 U.S.C. 3238 "Offenses Not Committed In Any District.

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought." (June 25, 1948).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORGE GABRIEL ROCHA, et al., Appellants,	)	
v.	)	No. 16839.
UNITED STATES OF AMERICA, Appellee.	)	

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the record from the United States District Court for the Southern District of California, Southern Division and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause as to Count I (conspiracy), is reversed, as to each appellant; the judgment of conviction as to each appellant on the respective substantive counts be, and hereby are affirmed and the matter is remanded to the said District Court for appropriate action in accordance with the opinion of this court.

(ENDORSED) Judgment
Filed and entered March 2, 1961,
FRANK H. SCHMID, Clerk.